FILED

No. 05-1231 MAR 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JEROME GIPPETTI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Does compelling the target of a tax investigation to obtain and produce records from an offshore bank that are not otherwise obtainable pursuant to an IRS Summons require the target to perform a testimonial "act of production" in violation of the target's Fifth Amendment rights?

2. Does the possibility that, subsequent to the target's compelled production of offshore bank records, the Government may be able to authenticate those documents from another source render the act of production non-testimonial for Fifth Amendment purposes or does it constitute prohibited use the "fruits" of the target's act of production against him?

3. Where the target of a tax investigation denies possessing foreign bank account records sought by an IRS Summons and asserts a Fifth Amendment defense to their production, does placing the burden of proving the lack of possession, custody/control of those records on the target violate his Fifth Amendment rights?

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is Jerome Gippetti, and the United States of America is the respondent.

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The Third Circuit opinion is unpublished, but is unofficially reported at 2005 WL 2980597, 2005 U.S. App. Lexis 24054, 153 Fed. Appx. 865. Appendix ("App.") 1a-9a. The district court's August 27, 2004 enforcement order is unpublished. App. 10a-13a.

STATEMENT OF JURISDICTION

The judgment of the Third Circuit was entered on November 8, 2005. On January 4, 2006, the Circuit denied a timely petition for reargument/rehearing *en banc*. App. 13a-14a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be in any criminal case to be a witness against himself,....

STATEMENT OF THE CASE

The Internal Revenue Service ("IRS") is conducting an "Offshore Credit Card Project" ("OCCP") which is aimed at identifying and investigating United States taxpayers who possess credit cards issued by foreign banks, particularly those located in so-called "tax havens."

As a result of an October 30, 2000 subpoena served on MasterCard in the Southern District of Florida, the IRS identified approximately 237,000 MasterCards issued to U.S. taxpayers by 28 banks in three Caribbean "tax haven" countries. Similar subpoenas were served on VISA and American Express in March 2002. In press releases, the IRS has stated that "there could be 1 million to 2 million U.S. citizens with debit/credit cards issued by foreign banks" and, in recent court filings, the agency has stated that it has more than 1,200 revenue agents assigned to audit the returns of taxpayers identified through the project.[1]

In these audits, the IRS demands that the taxpayers produce records of their foreign accounts, credit cards and other transactions and has been relentless in its contention that the subject taxpayers have no Fifth Amendment right to refuse to produce them. Gippetti was one of the taxpayers identified through the project as having two MasterCards issued through the Caymans National Bank ("CNB").

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[1] *See generally* www.irs.gov/newsroom/article/0,,id-105698,00.html and www.irs.gov/newsroom/article/00,,id-105695,00.html.

Gippetti's 1999 and 2000 tax returns were selected by the IRS for audit.[2]

On February 6, 2003, the IRS served a Summons on Gippetti demanding all records of foreign transactions he conducted in 1999 and 2000 including specifically the records of the CNB bank account and MasterCards (collectively, "the CNB records"). On February 3, 2004, the IRS petitioned the United States District Court for the District of New Jersey to enforce the Summons.

Gippetti moved to quash. He denied he possessed the CNB account and credit card records specifically identified in the Summons at the time the Summons was issued (in February 2003) and declined to provide any further information, citing his Fifth Amendment privilege.

The District Court heard oral argument from counsel, but did not conduct an evidentiary hearing. At oral argument, counsel for Gippetti advised the District Court that Gippetti was willing to execute a "consent directive" consistent with the Court's opinion in *Doe v. United States*, 487 U.S. 201 (1988) ("*Doe II*"). The Government's counsel rejected that offer because the Government did not have jurisdiction over CNB.

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[2] Gippetti filed 1999 and 2000 federal income tax returns on which he reported having a bank account at the Caymans National Bank ("CNB") in the Cayman Islands. Gippetti reported $620 in each of the two years as being the amount of interest income he received from CNB on the account. He also filed required Foreign Bank Account Report ("FBAR") forms on which he disclosed the location of the account (at CNB), the account number and made representations regarding the approximate size of the account (by checking a box selecting from among several ranges of monetary value).

The District Court concluded that Gippetti had established a legitimate basis for asserting his Fifth Amendment privilege against self-incrimination in response to the Summons. However, without addressing Gippetti's claim that he did not have possession or control of the CNB records, the District Court ordered Gippetti to produce them.

In response to the order, Gippetti wrote a letter to CNB patterned on the "consent directive" in *Doe II*. Gippetti advised CNB that he had been ordered to produce the specified CNB records and, in order to comply, he was "consenting" to having CNB send him copies of the records. CNB declined because it did not view his "consent directive" as a voluntary act as required by Cayman Islands law.

Gippetti timely appealed. The Third Circuit vacated the District Court's enforcement order for the CNB records, remanding the matter to the District Court for a further hearing on the issue of whether Gippetti had possession *or* control of the records on the date of the Summons. The Circuit further held that, at such a hearing, it was Gippetti's burden to prove that he lacked possession *or* control and, should he fail to meet that burden, the District Court should order Gippetti to produce the CNB records reasoning that doing so would not require Gippetti to be a witness against himself in violation of the Fifth Amendment.

The Third Circuit rejected Gippetti's claim that requiring him to do more than executing a *Doe II* consent directive would compel him to do the Government's legwork and thinking. The Circuit found that Gippetti's situation was similar to that of the taxpayer in *Fisher v. United States*, 425 U.S. 391 (1976) ("*Fisher*") because the existence and location of the records at CNB are a "foregone conclusion" and "it will involve no thinking by Gippetti or reveal the contents of his mind simply to turn